United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1362

UNITED STATES COURT OF APPEALS
For the Second Circuit

B
P/S

Docket No. 75 - 1362

UNITED STATES OF AMERICA,

Appellee

-against-

ROBERT HOLT,

Appellant.

On Appeal From The United States
District Court For The Eastern District
Of New York

BRIEF FOR THE APPELLANT

JAMES A. PASCARELLA
Attorney For Appellant
One Old Country Road
Carle Place, New York 11514
(516) 742-1134

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statues and Rules:

Other Authorities:

PRELIMINARY STATEMENT

Robert Holt appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.), entered on October 10, 1975, which judgment convicted appellant, after a jury trial, of three counts of a four count indictment involving violations of Title 21, United States Code, Sections 173, 174 and 841 (a) (1) and Title 18, United States Code, Section 2.

The first count in the indictment charged appellant together with one Dickie Diamond and "others known and unknown to the Grand Jury," as co-conspirators but not named as defendants, with conspiring to violate Title 21, United States Code; Sections 173, 174 and 841 (a) (1). This conspiracy count alleged, as part of the conspiracy, the unlawful receipt, concealment, buying, selling, and facilitating the transportation of quantities of heroin and cocaine, the unlawful distribution and possession of heroin and cocaine and that appellant, while employed as a member of the New York City Police Department, provided protection to the co-conspirators in the course of the transportation and distribution of narcotic drugs. The jury verdict acquitted appellant on this count.

Count Two of the indictment charged appellant with unlawfully receiving, concealing and facilitating the transportation

of quantities of cocaine and heroin. The third count charged appellant with unlawfully possessing with intent to distribute quantities of heroin and cocaine, and the fourth count charged him with unlawfully distributing quantities of heroin and cocaine. These, of course, were the three counts upon which appellant was convicted.

On October 10, 1975, appellant was sentenced to the custody of the Attorney General for a term of ten years, to run concurrently, on Counts Two, Three and Four, with five years special parole on Counts Three and Four. A stay in execution of sentence pending appeal has been granted by the District Court.

On October 23, 1975, a hearing was conducted pursuant to appellant's motion to reopen the suppression hearing previously held and take additional testimony. At the conclusion of this testimony, appellant again moved to suppress certain alleged admissions made by appellant to federal agents, Grand Jury testimony of the appellant and the admission into evidence of certain wiretap conversations. Judge Weinstein denied the relief sought and his order of denial was filed on October 24, 1975

Notice of appeal of the judgment of conviction was filed on October 10, 1975. Notice of appeal of the Court's order of October 24, 1975, was filed on November 21, 1975. A motion to consolidate these matters on appeal was also filed on that date.

STATEMENT OF THE CASE

A. Proceedings Prior to Trial

On December 17, 1974, appellant, a New York City Police Officer, appeared, for the first time, at the office of Assistant United States Attorney Kenneth Kaplan at Kaplan's request. (R.607, A.76).* Also present at this time were Martin Maguire, Daniel Martin and Richard Moser, all special agents of the Drug Enforcement Administration, and Assistant United States Attorney Appleby. Appellant was not represented by counsel. (R.522,607,634,717, A.77). In fact, he did not know the reason he was called to the office. (R.542).

At this meeting, appellant was informed by Mr. Kaplan that he was "one of the most corrupt cops" he had ever come across. (R.543,718). Mr. Holt was asked various questions including whether or not he wished to cooperate with the Government.** This cooperation, he was told, was to take the form of, at least in

---

* "R" designates reference to the record; "A" designates reference to Appellant's Appendix.

** At a suppression hearing held during the course of the trial, Mr. Holt contended he was not advised of his Constitutional rights at the December 17, 1975 meeting. He claimed he was advised, of his rights at the meeting of December 27, 1975, after he heard a wiretap tape recording of his voice. Judge Weinstein found appellant was timely given his Miranda warnings on December 17, 1974. (R.596-597).

part, a "full and total disclosure of all his illegal activities" (R.528, 524, A.81). Appellant Holt indicated he wished to co-operate in every way he could (R.526, 718) and then made various statements. These statements were introduced into evidence against appellant at his trial. (R.607-618).

At this meeting Holt was advised that he was to come back to the assistant's office on December 27, 1974, and he was also given a grand jury subpoena for that date. (R.528, 548-549, 618, A.79). Within a day or two of December 17, 1974, appellant discussed the meeting held in Kaplan's office with his immediate superior, Sergeant Cornelius Blackshear, New York City Police Department. (A.72-73). Holt told Blackshear that at the meeting Kaplan had told appellant that he might be indicted but that he could possibly be allowed to plead to a lesser charge (A.73). In fact, Blackshear said specifically that appellant told him that "he had been offered a plea" (A.74) and that he would be charged in an information. (A.75).

On December 27, 1974, appellant returned to the office of Assistant United States Attorney Kaplan. Present were the same individuals in attendance at the first meeting. Appellant had no attorney with him, nor had he consulted with one. (R.524, 549, 731, 752, A.80). Again appellant was questioned, and again he made various statements which were introduced in evidence at trial by the Government (R.618-622, 631-632). It was also during this

meeting that a tape recording of a wiretapped telephone conversation of October 1, 1971, was played for appellant to hear. Appellant admitted upon hearing this that the voice was his. The other voice in the taped conversation belonged to one Ernest Solomon.* (R.530, 550-551, 620-622, 732-733).

There came a time during this second meeting when appellant was told by Mr. Kaplan and the agents that they were not satisfied with his cooperation. (R.529, 531, A.79). Appellant was then brought before a grand jury that same day. (R.531, 552, 751-752). He signed a waiver of immunity (R.578) and during the course of his grand jury testimony, appellant made a number of admissions.** Following his grand jury testimony appellant further cooperated with the Government. (R.590, 593, 642). He apprised the Government of two witnesses who could aid in the trial of police officers pending in the Eastern District (United States v.

---

* The Government had a second recording of a wiretapped conversation between appellant and Solomon which took place on October 4, 1971, but it was not played for appellant at that time. (R.732). These conversations were part of hundreds of conversations intercepted via a wiretap order on a telephone used by Solomon. The order in the Solomon case was obtained by police officers John McClean, Edward Cordelia and Ralph Viera, who were subsequently convicted in federal court of using illegal wiretaps and shake downs, including a shake down of Solomon. The indictment in the Solomon case was dismissed by the Kings County District Attorney after the conviction of the above-said police officers. (A.87-91).

** It should also be pointed out that previous to these meetings with Holt, the New York City Police Department and the Brooklyn District Attorney's Office had investigated Holt after his voice was identified on the aforementioned tape recordings of the wiretapped conversations. The information gathered in this way was made available to the Government. (A.117-143).

McClean, Cordelia, Viera, et al.) and was used by Mr. Kaplan to locate and bring the witnesses in to see him. He also stayed with one of the witnesses (Betty Calvo) from time to time as security, and, in fact, received money payment from the Government for this work. The police officers were tried and convicted in April, 1975.

Appellant was indicted on May 14, 1975. On May 15, he was suspended, without pay, from the New York City Police Department.

On July 31, 1975, pursuant to a motion by the Government, a deposition was taken of Vincent Fay, Assistant District Attorney of Kings County. This deposition was to become a part of the suppression hearing requested by appellant.*

B. The Trial

The Government's case consisted of five witnesses who were either in jail, awaiting sentence or granted immunity. In fact, all were given immunity from prosecution as to what they were testifying. These witnesses were "cooperating" with the

---

* The validity of the wiretap which produced the tapes of the Holt-Solomon conversations of October 1 and 4, 1971 was placed in question by appellant. Judge Weinstein denied appellant's motion to suppress the wiretap evidence. He also denied appellant's motion to dismiss the indictment.

Government by testifying. The case for the prosecution also included the testimony of a special agent of the Drug Enforcement Administration who was present during the December 17 and 27, 1974, meetings and testified as to appellant's admissions at these meetings, the tape recordings and transcripts of appellant's conversations with Ernest Solomon and appellant's grand jury testimony of December 27, 1974.

The testimony of the first five witnesses for the Government was, in sum, that appellant provided protection for a drug operation and received money and drugs (heroin and cocaine) for this protection (the drugs received being for appellant's personal use), that appellant snorted cocaine and provided snorts of cocaine to three of these witnesses and perhaps others and that appellant frequented bars and associated, at least to some extent, with various individuals who were trafficking in drugs.*

One of these witnesses, Dickie Diamond, was a convicted murderer drug dealer, thief and pimp. He was also a professional type witness, having testified in court for the Government on some

---

* Appellant was born and raised, lived and worked in Bedford-Stuyvesant, a section of New York City with a high incidence of drug use. It may not be too unusual, then, for appellant to know people who could also be dealing in or using drugs.

It is also interesting to note that the jury acquitted appellant of Count I, giving strong indication they did not believe the so called evidence relating to protection or alleged corruption.

five previous cases and in grand jury sessions numerous times. His testimony was the primary testimony relied on by the Government to establish the charges in Count I.*

The primary evidence against appellant (as Judge Weinstein indicated (A.67)) was the admissions he made (to the federal agents and in the grand jury) and the wiretap conversations.

The case for the defense was based on the testimony of seventeen witnesses, including appellant. Several witnesses testifed to matters which were contrary to and, thus, created issues of fact as to what the Government witnesses had earlier related. Fourteen witnesses gave testimony on Holt's character. Eight of these witnesses were New York City Police Officers who knew and worked with appellant over various periods of time. Besides testifying to appellant's good character, they also testified that if someone snorted heroin and/or cocaine, there would be, based on their years of experience, certain telltale signs. All eight of these men testified they did not notice any such signs in appellant, even though they had worked closely with him, each during varying time periods. All felt if appellant had been using drugs, as various Government witnesses testified, they would have known it. The other six character witnesses were neighbors,

---

* It is interesting to note that as long as Diamond cooperated, his family would be supported by the Government, and he would not serve his sentence in a state (New Jersey) prison but, rather, in a federal safe house.

appellant's minister and two attorneys.

Following the defense case, the Government presented a rebuttal witness. He was the Deputy Chief Medical Examiner of New York City and testified as a medical expert. His testimony was that it was his opinion if someone snorted heroin and/or cocaine, a non-medical person would not be able to discuss it or see the effects of it. The defense was not given a realistic opportunity to obtain a medical expert with opposing views, even though the defense made it known there were such experts.

It should also be noted that during the course of the trial, out of the presence of the jury, a hearing was had to determine whether or not appellant was properly advised of his Miranda rights during the December, 1974 meetings in Mr. Kaplan's office. The hearing also dealt with the issue of whether or not an offer of a plea was made at those meetings. Judge Weinstein ruled in favor of the Government on these issues. (R.518-601).

ARGUMENT

POINT I

THE WIRETAP CONVERSATIONS BETWEEN APPELLANT AND ERNEST SOLOMON WERE IMPROPERLY ADMITTED INTO EVIDENCE.

On September 19, 1971, upon application of the Kings County District Attorney's Office, an electronic eavesdropping warrant was issued by Justice Starkey, Supreme Court, State of New York. This order authorized the electronic interception of telephone conversations of Ernest Solomon over a particular telephone instrument located at 91 Ocean Parkway, Brooklyn, New York, listed in the name of Pricilla Panky. * (A. 97-115a). Appellant, on October 1, 1971 and October 4, 1971, during the period of time covered by the initial intercept order, made two telephone calls to Ernest Solomon at 91 Ocean Parkway. These conversations (A. 147-150) were introduced into evidence against appellant at trial.

The first issue to consider is whether appellant has standing to seek suppression of the wiretap evidence in question. It is his position that he does.

To have standing to contest evidence obtained from an allegedly illegal electronic eavesdrop, one must be an "aggrieved person." Alderman v. United States, 394 U.S. 165 (1968). The Supreme Court, in Alderman, stated:

---

* The indictment against all the defendants in the Solomon case was dismissed by the Kings County District Attorney's Office upon the conviction, in federal court, of the police officer who obtained and provided the basis for the wiretap order. Their convictions involved illegal wiretapping and their credibility was doubted. (A. 90-91).

> ... any petitioner would be entitled to suppression of government evidence originating in electronic surveillance of his own Fourth Amendment right to be free of unreasonable searches and seizures. Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises ... (Emphasis added).

It is argued that appellant comes within the Supreme Court's guidelines of an "aggrieved person." The search and seizure (electronic intercept) by the state government certainly goes to appellant's Fourth Amendment rights. If the intercepted and monitored conversations were unlawfully overheard, appellant should be able to complain and be heard.

Appellant is aware of United States v. Poeta, 455 F.2d 117 (2d Cir. 1972). The Court, in one paragraph of a lengthy decision, states as to the issue of minimization raised by Poeta that the "tap was on Stepenberg's telephone, not Poeta's. Poeta lacks standing to contest any such invasion of Stepenberg's rights." Appellant contends that the Court did not intend for Poeta to stand for the proposition that no one but the person whose telephone was tapped has standing to raise the minimization issue. Support for appellant's position is formed in the Alderman case, as already pointed out, subsequent cases in this Court, the federal and New York electronic eavesdropping statutes and in Poeta itself.

In reviewing Poeta, we find the Court entertained Poeta's claim relating to the probable cause basis for the wiretap order. The Court found Poeta to be an "aggrieved person" and, thus, to have standing to raise that issue. Can it then be said that Poeta stands for the proposition that absolutely no one, other than the one to whom the telephone belongs, can ever raise the minimization issue?

In the very case which involved the wiretap now in question (ie. People v. Solomon, et al.), the telephone was not listed in Solomon's name. Yet, Solomon had standing to raise the minimization issue in state court. So, too, did Solomon's co-defendants (and none of them lived at the address of the subject telephone instrument) have standing to raise this issue. The telephone certainly was not theirs.

Further, the District Attorney, pursuant to New York law, N.Y.C.P.L. §700.50 (3), gave notice of the wiretap to all the subsequent co-defendants. (A. 116). Was this a pointless gesture? Appellant submits it was not. Rather, it serves to give notice to those who would have standing to raise issues of their Fourth Amendment rights.

If one looks to the federal and New York statutes (18 U.S.C. §2510 et seq. and N.Y.C.P.L. §710, respectively), support is also found for appellant's position. In these statutes an "aggrieved person" is defined as "a person who was a party to an intercepted wire or oral communication or a person against whom the interception was directed." (Emphasis added). 18 U.S.C. §2510(11). See also, N.Y.C.P.L. §710.10 (5). Such a person is permitted to "move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that (i) the communication was unlawfully intercepted" or "(iii) the interception was not made in conformity with the order of authorization or approval." 18 U.S.C.§2518(10)(a)(i) and (iii). Minimization is required under both the federal and New York Statutes. 18 U.S.C. §2518(5) and N.Y.C.P.L. 700.30(7). It must then follow, a failure to minimize is both an unlawful interception and an interception "not made in conformity with

the order of authorization or approval."

Additionally, cases of this Court decided subsequent to Poeta, supra, may be said to demonstrate that persons other than the one whose telephone has been tapped have standing to raise the minimization issue. See United States v. Bynum, 485 F.2d 490, (2d Cir. 1973); United States v. Tortorello, 480 F.2d 764 (2d Cir. 1973); United States v. Manfredi, 488 F. 2d 588 (2d Cir. 1973); United States v. Rizzo, 491 F. 2d 215 (2d Cir. 1974); United States v. Cirillo, 499 F.2d 872 (2d Cir. 1974); United States v. Sisca, 503 F. 2d 1337 (2d Cir. 1974). In all of these cases there were minimization issues raised by others than those whose telephones were being tapped. In none of these cases did the Court hold that these individuals referred to lacked standing to raise the issue.

United States v. Scott, 504 F.2d 194 (D.C. Cir. 1974), is also helpful in determining the issue. Scott was a participant in an intercepted telephone conversation as a result of his calling another person whose telephone was tapped (much the same case as appellant). He (Scott) moved to suppress evidence obtained from the wiretap on the ground that the Constitutional and statutory mandate of minimization was not met. The Government contended Scott was not an "aggrieved person" and, so, could not challenge the wiretap on minimization grounds. The Court held that such an interpretation as suggested by the Government was unduly restrictive in light of the statutory definition of "aggrieved person." The Court went on to say:

> There appears to be no question that each of the appellees in this case is an 'aggrieved person' within the meaning of the statute. As such each is protected by the stringent safeguards of

> Title III, including the requirement that agents minimize interceptions of conversations that they are not authorized to intercept. Each aggrieved person is entitled to question whether the statutory minimization requirement has been satisfied and, on proving that it has not, to move to suppress a communication on the ground that 'the interception was not made in conformity with the order of authorization and approval.

The standing issue having been discussed, appellant now claims that the statutory minimization requirement was not satisfied because of the failure to include a minimization clause in the original eavesdropping warrant and the failure to minimize in fact during the course of the electronic interceptions.

The minimization provisions of the New York and federal statutes find their origin in the language of the Fourth Amendment, which requires that search warrants "particularly describ[e] the place to be searched and the persons or things to be seized." This "particularity" requirement was held applicable to eavesdropping warrants in Berger v. New York, 388 U.S. 41 (1967), and compliance with this requirement was a major objective of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. section 2510 et seq.) and New York Criminal Procedure Law Article 700. The New York Law, adopted pursuant to section 2516(2) of Title III, virtually tracks the language of Title III.

When an eavesdropping warrant is issued by a State court judge pursuant to State law and the evidence secured is sought to be introduced in a federal prosecution, this Court has ruled that the question of the validity of the warrant itself is clearly a question of state law. United States v. Rizzo, 491 F. 2d 215 (2d Cir. 1974), United States v. Manfredi, 488 F. 2d 588 (2d Cir. 1973).

The state law to be applied here indicates that the requirement that minimization be a part of any eavesdropping warrant (CPL section 700.30(7)) is a mandatory requirement and not merely directory in nature People v. Haskell, 9 N.Y. 2d 729 (1961); People v. Kennedy, 75 Misc. 2d 10 (1973); People v. Castania, 73 Misc. 2d 166 (1973); People v. Holder, 69 Misc. 2d 863 (1972).

There can be no doubt that there was no minimization provision in the original order of Justice Starkey. Hence, it should follow, according to the reasoning of the New York cases cited, the order and, so, the wiretap, was improper, since it did not meet the requirements of the New York statute. *

Appellant is aware of the several federal cases which indicate that the absence of a minimization provision in the order is not fatal per se. United States v. Bynum, supra; United States v. Manfredi, supra; United States v. Rizzo, supra; United States v. Cirillo, supra. However, in each of these cases, there was an overriding factor -- either there was a minimization provision in an earlier order, or there was minimization language in supporting affidavits, or there was a regular judicial supervision of the intercepts, or there was minimization in fact. None of these overriding factors are present in the case at bar. There is present here more than just a mere omission of minimization language in the wiretap order.

---

* It should be noted that even though the extension order, which issued on October 19, 1971, contained a minimization clause, the conversations of the defendant, which are in question here, were intercepted under the original order which contained no such provision.

Beyond that, the New York statute, if we are to judge from the New York cases cited, infra, is stricter in this regard than the federal statute -- the minimization language is mandatory, and this is not improperly so. Senate Report No. 1097, 90th Cong., 2d Sess. (1968), states, at page 2187:

> The State [eavesdropping] statute must meet the minimum standards reflected as a whole in the proposed chapter. The proposed provision envisions that States would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation.

Appellant further claims that the evidence obtained as a result of the eavesdropping warrant should be suppressed because of the failure to minimize in fact during the course of the interceptions. People v. Kennedy, supra; People v. Castania, supra; People v. Tartt, 71 Misc. 2d 955 (1972); People Holder, supra. See also, United States v. Cirillo, supra; United States v. Bynum, supra; United States v. Tortorello, supra.

The facts of this case (A. 144-146) are that there was no minimization in fact. The deposition of Assistant District Attorney Vincent Fay leaves no doubt the police officers intercepted and recorded all telephone calls without any attempt to minimize as to those calls which were not pertinent to the investigation or goals set forth in the order.

POINT II

UNDER RULE 11(e)(6) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, ADMISSIONS MADE BY APPELLANT TO FEDERAL OFFICERS AND APPELLANT'S GRAND JURY TESTIMONY WERE ERRONEOUSLY ADMITTED INTO EVIDENCE AT TRIAL.

Rule 11(e)(6) provides, in relevant part, as follows:

> INADMISSIBILITY OF PLEAS, OFFERS OF PLEAS, AND RELATED STATEMENTS. - Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer ...

This portion of Rule 11, which became effective on August 1, 1975 comports with the general primary objective of the rule as a whole and that is "to encourage complete openness on the part of the defendant who pleads guilty." Statement of Judge Lumbard, Hearing, Subcomm. on Criminal Justice, Comm. on the Judiciary, H.R. 94th Cong., Serial No. 6, at 212. It comports, too, with what must, presumably, also be an objective of the rule, that is, to encourage complete openness during plea negotiations. It is well known that the criminal prosecution system depends on pleas of guilty to dispose of the bulk of cases. Frank discussions of pleas should, then, not be discouraged. Appellant contends that such openness is just as important during plea negotiations as it is during the actual pleading (of guilty). Negotiations before a prosecutor should be open so that both sides can adequately comprehend the nature of the plea bargaining and, therefore, statements made by a defendant in connection with plea negotiations

should not be admissible against a defendant. For example, the negotiation for a plea may include an understanding that the defendant will cooperate with the prosecution (either in the case at hand or other cases or potential cases). It becomes obvious, then, that openness with the prosecutor is essential for him to evaluate the importance of the cooperation, its extent and the credibility of what he is told. Similarly, it is important for a defendant to know just what the prosecutor's evaluation of his cooperation is and what he can expect from the prosecutor. The result of this will also be of aid to a court which must determine if a plea will be accepted. This is especially so if, as Judge Weinstein suggests and as the legislative comments to the rule suggest, a disclosure of the plea bargaining is made known to the court. Weinstein's Evidence, Vol. 2, 410-14. Certainly, this would be a way to achieve a "recognition of the propriety of plea discussions and plea agreements," one chief objective of Rule 11. Weinstein's Evidence, Vol. 2, 410-25.

While it is true most of the legislative comment relating to Rule 11(e)(6) is addressed to a plea of guilty (or nolo contendere) later withdrawn, the rule just as certainly also deals with an offer to plead and statements made in connection with the offer. It is also true that most of the comments relating to the legislative history of this portion of the rule talks in terms of offers by a defendant to plead. However, as a practical matter, it must not be overlooked that an offer to plead can be an offer from the prosecutor. The language of the rule would seem to encompass such an offer. Judge Weinstein, in his treatise, states that it appears to be the case that the rule applies whether plea discussions are initiated by the defendant (or his attorney) or

by a representative of the prosecutor. Weinstein's Evidence, Vol. 2, 410-41.

Appellant claims there was, in fact, an offer of a plea made to him by the prosecutor and that statements, connected with the offer, that is, certain admissions to federal officers and his grand jury minutes, should not have been allowed into evidence at his trial. More specifically, it is appellant's contention that he was offered a plea when he appeared at Assistant United States Attorney Kenneth Kaplan's office on December 17, 1974. That there was such an offer is amply supported by the record.

During the suppression hearing, agent Martin Maguire, who was present at the December 17, 1974 meeting, testified on direct examination that Holt was told by Kaplan that he "had a chance to cooperate fully and make a full and open disclosure" and that the "question was opened, whether or not he would get a lesser plea." Holt was further told that "if he made a full and complete disclosure, that possibly he could plead to one count, thus avoiding a serious sentence and from prosecution." (R.524). These statements mark the beginnings of plea negotiations and the ensuing offer. The negotiations become more complete when agent Martin tells us that appellant told those present at the meeting that he "wanted to cooperate in every way he could." (R.526). The response to this statement by appellant was that he was told that "[i]f he did cooperate he was going to have to plead guilty to a lesser charge." (R.527). Further, appellant was advised that what the Government expected in the way of cooperation would be "a full and total disclosure of all his illegal activities." (R.528).*

*See Footnote on following page.

It becomes apparent that cooperation means, according to the representatives of the Government at the meeting, that appellant must incriminate himself. This becomes the basis of the negotiations*

What transpired at that December 17 meeting is made even clearer when agent Daniel Martin testified as follows:

Q. During the course of either of these meetings was Mr. Holt ever advised of the fact that he was a corrupt police officer?

A. Yes.

Q. And with regard to statements of that type, was it subsequently stated to Mr. Holt or was an offer made to Mr. Holt of a reduced plea?

A. Yes.

Q. And what was that offer that was made?

A. The offer that was made, that he would - he might be able to plead to one count of the charges, and that at the time of sentencing his cooperation would be made known to the Court.

Q. And when was this said to Mr. Holt?

A. This was at the beginning of the meeting.

Q. At which meeting?

A. The December 17th meeting. (R.592-593).

It is true when Judge Weinstein asked appellant during the hearing if he were offering to plead guilty, he answered in the negative, as he did when the Judge asked him if there was any

---

* Appellant, in his testimony at the suppression hearing, testified in a similar manner as to what was expected in the way of co-operation. (R.587).

intention in his mind that he might plead guilty. (R.558). * However, what is apparent is that a plea was offered to appellant on December 17. Appellant stated, during the course of the hearing and the trial, that he was offered a plea while in the assistant's office and, further, that if he cooperated with the Government, he would be offered a tax count to plead to. (R.585, 728).

This is further substantiated by what appellant told his immediate supervisor, Sergeant Cornelius Blackshear. Sergeant Blackshear testified at the reopened suppression hearing on October 23, 1975. ** His testimony was that, as appellant's supervisor, he knew Holt was called to the United States Attorney's Office on December 17, 1974. He also stated that a day or two after this meeting appellant spoke to him about what took place at the meeting. (A. 71-73). Blackshear left no doubt as to what he was told transpired when he said, on cross-examination by the Government, that "[appellant] said he had been offered a plea." (A. 74). This, then, demonstrates, unless we are to disbelieve Blackshear, what had occurred at the meeting of December 17. Certainly, Holt had no reason to lie about any offer of a plea made to him when he spoke to Blackshear a day or two after the meeting.

---

* This occurred while appellant was on the witness stand during the suppression hearing and while there was a break in the questioning when the Court and counsel were discussing Rule 11(e)(6).

** Defense Counsel learned that Sergeant Blackshear was aware of an offer of a plea made to appellant when counsel was discussing other aspects of the case with the sergeant. This was after the suppression hearing was closed. Defense counsel then sought to reopen the hearing during the trial and again after conviction, but the Court would not allow him to do so. (R.832-833, 1323). A similar request after sentencing was granted.

It is also interesting to note that the prosecutor, previous to the suppression hearing held during the trial and apparently gratuitously, stated to the trial court:

> [i]f Mr. Pascarella intends to elicit through the witness [agent Maguire] on cross-examination that Mr. Holt was in any way cooperative with the Government, and his reason to cooperate subsequent to statements made to the United States Attorney's Office, I intend to bring out the fact that Mr. Holt had agreed at one point to plead guilty to a narcotics charge. (Emphasis added) (R.501-502).

During his testimony at the reopened suppression hearing, the Government prosecutor, denied appellant was offered a plea in December 1974. (A. 76-85). It was also his testimony, however, that he informed Holt at the December 17, 1974 meeting that appellant might be afforded "the opportunity of receiving a lesser plea" if he cooperated (A. 78,83). Kaplan gave appellant an example of what could happen if he cooperated by stating that other police officers who had cooperated got lesser pleas and, in particular, one police officer had gotten a sentence of only six months. (A. 78). It was further explained to appellant that by cooperating it was meant that he was to make a full disclosure of his illegal activities. (A. 79).

The Government prosecutor also testified that when, at a time subsequent to December 1974, appellant had an attorney present, "he may have been offered the opportunity to plead again" and that the "possibility of a plea" was discussed. (Emphasis added). (A. 85). The following questions were asked and answers given:

> Q. So then it's your testimony that prior to indictment in the presence of Mr. Bishop [Holt's attorney at the time], you offered a plea to Mr. Holt and the plea was to a major narcotics count, is that correct?

A. I told Mr. Bishop this is what we expected. If you want to consider it an offer, that was what the conversation was.

Q. Let me ask you this: In your mind, did you ever offer a specific plea?

A. I think that would be a fair statement, in my mind I would say that, yes, we expected that Mr. Holt would have to plead guilty to a major narcotics felony count. (A. 86).

It becomes apparent from this testimony that in this instance when the Government is talking about an opportunity or a possibility to plead, Mr. Kaplan considers it an offer of a plea; yet, it was contended by the Government, during the crucial December 17 meeting, the opportunity or possibility of a plea was not an offer. Appellant submits there was an offer of a plea made by the Government on December 17, 1974; that what transpired were plea negotiations and an ensuing offer. This is what prompted appellant to make various admissions at the meetings in December and eventually to testify before the grand jury. Appellant can reasonably be said to have believed that this was his cooperation. (R. 524, 528-529, 531, 541, 585-587, 593).

Further, it was also reasonable for appellant to assume that the Government representatives he dealt with had the power to plea bargain, and, so, the admissions were given in return for the bargain.

Appellant contends, then, that the admissions made on December 17 and 27, 1974 and his testimony in the grand jury on December 27, 1974 come within Rule 11(e)(6) and, therefore, should

have been excluded at his trial. Further, it is appellant's contention that without that evidence, there would have been no basis for the wiretap conversations to be admitted into evidence. Therefore, the error was compounded when the wiretap evidence was accepted.

POINT III

ERROR WAS COMMITTED BY THE TRIAL COURT WHEN APPELLANT WAS DENIED REASONABLE OPPORTUNITY TO OBTAIN AN EXPERT MEDICAL WITNESS IN RESPONSE TO EXPERT CALLED BY THE GOVERNMENT IN ITS REBUTTAL CASE.

At the conclusion of the defense case, the Government indicated to the Court and to defense counsel that it would call a rebuttal witness. The prosecutor then announced that this witness was Dr. Michael Baden, Deputy Chief Medical Examiner of the City of New York. This was the first time defense counsel was made aware that the Government intended to call a medical expert. Defense counsel pointed out to the Court that the Government did not previously notify him of this witness although the Court had indicated that should be the case. (R.1072 or A.22). Counsel for the defense further states, "[i]f I had known something about this, we could have prepared. I am going to have to ask for a continuance." The Court indicated there would be no continuance. (R.1073 or A.22A).

It should be pointed out that eight of the witnesses who testified for the defense were police officers. Each of these witnesses testified as to appellant's good character. They also testified that as police officers, they were aware of symptoms exhibited by persons who "snorted" cocaine or heroin.*

---

* During the course of the Government's case, no less than five witnesses testified that appellant was a user of cocaine and/or heroin.

Several of the officers testified they had done police work in the narcotics bureau and, so, were really quite familiar with these effects or symptoms of the use of heroin or cocaine. These symptoms included such conditions as glassy eyes, running nose or sniffles, dilated pupils, head nodding, etc. A number of these officers, all of whom had worked closely with appellant at one time or another, stated they never saw appellant exhibit any of these telltale signs and further stated they believed if he had used drugs, they would have know about it.

The gist of Dr. Baden's testimony was that someone who "snorted" cocaine or heroin over a period of time would show no signs that would be apparent to anyone but a medical person upon an examination. (R.1078-1082, 1090, 1093-1094). It is obvious that this type of testimony from a medical expert, especially one with so impressive a list of credentials (R.1074-1078), can discredit, in the eyes of the jury, the testimony of the police officers who testified. Appellant contends that he was denied a realistic or reasonable opportunity to obtain a medical expert with opposing views, even though the defense made it known to the Court that there were such experts, and, in fact, defense counsel had spoken with some of them. (R.1111 or A.24).

It should be noted that the medical expert called by the Government in rebuttal testified in the early evening of a Friday. In fact, he finished testifying at 6:30 p.m. (R.1104 or

A.22b). At that time the Court stated that "if the defendant wants to put on an expert within to rebut what this witness has said, I will take it Monday morning. 10:00 o'clock." Defense counsel pointed out it would be difficult to arrange for such a witness by Monday morning. (R1104 or A.22b). Further, when counsel for appellant indicated he might be able to get an expert witness by Monday afternoon, the Court said, "Monday afternoon, I'm afraid it will be all over" (R.1104-1105 or A.22b-23). Again counsel point out that if the Government had advised him earlier they were going to call this witness, he could have arranged for an expert also. (R.1105). The Government's so advising appellant could have expedited matters and, more important, the appellant would not have been caught up in the expedition of the trial (and, thus, deprived of an important witness).*

On that following Monday morning, defense counsel apprised the Court that he had spoken with various medical experts who held views contrary to Dr. Baden. It was indicated that such experts as Dr. Leslie Lukash, Medical Examiner of Nassau County and Dr. Milton Halpern, former Medical Examiner for the City of New York,

---

* During the trial, the Court indicated its wish to move ahead. "I have to terminate this case and I do not want any continuances." (R.920). Further, the Court stated, "We are late in the game. I want to move ahead without the necessity of continuances. I have other cases starting on Monday. (R.921).

were among those whose views differed from Dr. Baden's. Counsel for appellant further stated:

> I think in light of the impact that his [Baden's] testimony might have with regard to the testimony of the Police Officers who testified with regard to the symptoms of the drugs - in their opinion, they didn't think Mr. Holt took the drugs.
>
> I think it is important. I think that it would be appropriate for the Court to grant some short continuance until I get one of these witnesses.
>
> I would say - I was on the phone with some of them all hours last night. I waited for Dr. Lukash to come back from a holiday last week[end] and I spoke with him and what he would be willing to testify to, but he's tied up today. (R.1111-1112, or A.24-25).

Still, the trial Court would not grant a continuance. There was only a brief recess and defense counsel could not have an expert appear in time to testify. (R.1137-1138, or A.30-31).

The dispostion of a request for a continuance may rest in the discretion of the trial judge, but appellant claims there was, in this case, an abuse of that discretion. Avery v. Alabama, 308 U. S. 444 (1940); United States v. Bentvena, 319 F. 2d 916 (2d Cir. 1963). Appellant further claims that there has been a showing that the testimony of Dr. Baden prejudiced, and unduly so, the testimony of important defense witnesses (i.e. the police officers). An expert testifying for the defense was, given a reasonable continuance, more than a real possibility; such testi-

mony would have been vital to the defense case, and certainly, it would not have been cumulative. Any argument that it would have caused undue or unreasonable delay is also without merit.

Finally, appellant contends the Court's charge to the jury did not cure the prejudice incurred.*

---

* "You also heard from a medical expert. Other experts have contrary views as revealed by the testimony. You should evaluate the credibility of this expert the way you would any other witness." (R.1284, or A.59).

POINT IV

THE CUMULATIVE EFFECT OF IMPROPER STATEMENTS MADE BY THE PROSECUTOR DURING THE COURSE OF THE TRIAL AND IN SUMMATION RESULTED IN SUBSTANTIAL PREJUDICE TO THE APPELLANT

Appellant contends that improper statements of the prosecutor seriously prejudiced the trial. This occurred during questioning by the prosecutor and in his summation. During the testimony portion of the trial itself, the prosecutor recalled some of the testimony of the appellant wherein he discussed his background with the Police Department and the various commendations he received. Then, in an argumentative manner, the prosecutor asked appellant:

> Q. Did you tell us, sir, about the specifications and the charges you had been brought up on in the Department during your years in the Department?
>
> A. I wasn't asked that question [on direct], sir. (R.785).

At that point, defense counsel asked for a side bar. The Court denied this request but advised the prosecutor, "I am not interested in any charges." (R.785). There was, however, no instruction given to the jury with regard to the statement in the prosecutor's question.

Notwithstanding the warning by the trial judge the prosecutor subsequently asked appellant, "[s]ir, were you ever charged with making a false statement in the course of that investigation." Counsel for the defense objected to the question, and the Court, in sustaining the objection stated, "if he was charged and not convicted, I don't want it." (R.793). Again, there was no instruction to the jury at this time. The damage had been done.*

The prosecutor continued to make this type of comment in his questions of appellant and other witnesses. For example, he asked defense witness Ambrose (a character witness) and defense counsel objected, "[d]id you ever hear that Mr. Holt had been involved in shaking down numbers runners." (R.974-975). Similarly, defense witness Blackshear (whose testimony included testimony of character) was asked whether or not he heard that appellant had shaken down numbers runners or prostitutes. (R.1018). Defense witness Rivera (a character witness) was not spared these questions either (R.1056). Rivera was further asked if he ever heard "of an incident in July of 1972,... where a female by the name of

---

* In fact, as the prosecutor knew from the records of appellant he had before him, the charge regarding false statements was dismissed. See also defense counsel's further objection to the comment. (R.1106, or A.21A).

Lillian Day got possession of Mr. Holt's revolver and shot at Mr. Holt at their residence?" (R.1056).

The prosecutor's summation also contained improprieties unduly prejudicial to appellant:

> Of course now under the circumstances when Mr. Holt takes the stand he's trying to minimize his involvement with Diamond. There is one thing he can't minimize, Page 31, the Grand Jury testimony.
>
> This is incredible. When you think of it in light of the present testimony that there is just no way that he ever got money from Diamond and he got no drugs from Diamond and certainly after he found out Diamond was a drug dealer he was terminating his association. (Emphasis added) (R.1222).

In this same vein of comment, the prosecutor also states, "[a]gain there is a ridiculous explanation later from the witness stand, from Mr. Holt ... " (Emphasis added) (R.1231).

Similar comment from the prosecutor is abundant. For example he states:

> [i]f you look at Mr. Holt's testimony you will see the lengths to which Mr. Holt went to fabricate events, associations and the admissions he made to Mr. Maguire in the grand jury to get out, again, from under an overwhelming case. (Emphasis added) (R.1250).
>
> Again an opportunity [for appellant] to fabricate some fantastic story to conform to some event some years before. (Emphasis added) (R.1256).*

---

* The prosecutor adds to his error when he stresses the "overwhelming nature of the evidence" against appellant. (R.1256).

Appellant also contends error was committed when, in summation, the prosecutor said:

> Talking about Lillian Day [who was named in a overt act of the conspiracy count (A.7)], where was Lillian Day in this case? Bob Holt's girlfriend wasn't called to the stand to corroborate any of this testimony by the defense. In fact, she wasn't called to deny - (Emphasis added) (R.1243-1244).

Defense counsel objected to this as being unfair comment. The Court then told the jury, "[t]he defendant can put any witness on, ladies and gentlemen." (R.1244). Clearly, this was improper comment. The burden is not on the defendant to disprove the case against him, but rather, upon the Government to prove its case. The Court's instruction to the jury did not cure the damage done.

It is appellant's position that the cumulative effect of all of the foregoing was so prejudicial as to require reversal. United States v. Tomaiolo, 249 F. 2d 683 (2d Cir. 1957). Indeed, it has been held that improper comment in each area specified herein by appellant may be grounds for reversal. See United States v. Drummond, 481,F. 2d 62 (2d Cir. 1973); United States v. La Sorsa, 480 F. 2d 522 (2d Cir. 1973), United States v. Puco, 436 F. 2d 761 (2d Cir. 1971); United States v. Tomaiolo, supra.

CONCLUSION

THE JUDGMENT HEREIN APPEALED FROM SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

December 10, 1975

Respectfully Submitted,

JAMES A. PASCARELLA
Attorney for Appellant
One Old Country Road
Carle Place, New York 11514

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF NASSAU, ss:

HERTHA CLAIRE ADELSON TROTTO, being duly sworn, deposes and says that on the 10th day of December, 1975, I served a true copy of the annexed Appellant's Brief and Appellant's Appendix on the Office of the United States Attorney, Eastern District of New York, by depositing the aforesaid true copy enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, such wrapper being directed to the person hereinafter named, at a place and address stated below:

Hon. David G. Trager
United States Attorney
United States Court House
225 CAdman Plaza East
Brooklyn New York 11201

Hertha Claire Adelson Trotto
HERTHA CLAIRE ADELSON TROTTO

Sworn to before me this
10th day of December, 1975

James A. Pascarella

JAMES A. PASCARELLA
Notary Public, State of New York
No. 30-4602169
Qualified in Nassau County
Commission Expires March 30, 1976